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CONCERT OF ACTION BY SUBSTANTIAL ASSISTANCE: WHAT EVER HAPPENED TO UNCONSCIOUS AIDING AND ABETTING?

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I. INTRODUCTION

As one commentator has uncomfortably noted, in the 1980's, courts seemed inclined to develop and use theories of liability, which ensured that the risk of injury and loss was transferred from consumer victims to manufacturers and then, through the price mechanism, to the community-at-large.¹ That was a time when courts seemed to be comfortable applying product liability without fault, and holding manufacturers as "insurers even for those products, which previously would not have been considered 'defective' in design, in manufacture, or in marketing."² Products liability, in the ensuing decade, has lost its nerve,³ or more accurately, the courts charged with responsibility to do justice in such circumstances have scaled the doctrine back, as well as some of the collateral doctrines necessary to accomplish its objectives.

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¹ Robert G. Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 AM. U.L. REV. 285, 297-99 (1988).

² *Id.* at 298.

³ The retreat of product liability is probably too notorious to require citation. However, it may be worthwhile to consider the latest Restatement in which strict liability has been banished from the areas of design and warning defects, areas where fault liability is notoriously unhelpful to plaintiffs. Strict products liability was originally intended for these areas, but only remains in the area of manufacturing defects, where it is singularly unnecessary. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

This note is based on the observation that liability based upon concert of action, as implicitly recognized by the New York Court of Appeals in *Bichler v. Eli Lilly*,⁴ seemed to be a suitable tool to further the public policy enunciated above, but that, sadly, it has been abandoned. New York courts, in the years since *Bichler*,⁵ seem to avoid concert of action, at least in its fully-developed form as articulated in section 876 of the Restatement (Second) of Torts,⁶ despite the fact that *Bichler* rested exclusively on that doctrine.⁷

Sometimes New York courts reject concert of action - a very tempting and generous collective liability theory - in favor of other collective theories more demanding of plaintiffs, and thus more difficult to prove, such as market share liability.⁸ For example, the New York Court of Appeals applied market share liability instead of concert of action in *Hymowitz v. Eli Lilly & Co.*⁹ At other times, New York state and federal courts, as discussed below, rather timidly recognized only express conspiracy or conscious "aiding and abetting" as constituting concert of action liability; that is, sections 876 (a) and (b), without subsection (c).¹⁰ It is intriguing that the third

⁴ 55 N.Y.2d 578, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982)(applying concerted action pursuant to RESTATEMENT (SECOND) OF TORTS § 876 (1977)).

⁵ *Id.*

⁶ RESTATEMENT (SECOND) OF TORTS § 876 (1977) (defining concert of action); See also *infra* notes 14-18 and accompanying text for definition of concert of action.

⁷ See *Bichler*, 79 A.D.2d 317, 436 N.Y.S.2d 625.

⁸ In concert of action, as opposed to market share, only one manufacturer has to be sued. *Bichler*, 55 N.Y.2d at 577-78, 436 N.E.2d at 186, 450 N.Y.S.2d at 781. Moreover, aside from direct proof of conscious conspiracy or of aiding and abetting, mere proof of manufacturers' "parallel conduct" mutually reinforcing their otherwise individual tortious conduct (e.g., failure to test the product on pregnant mice, See *id.* at 578, 436 N.E.2d at 188, 450 N.Y.S.2d at 782) may suffice. One commentator has noted defendants "detest" concert of action as opposed to market share because of its plaintiff-orientation.

⁹ 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989) (acknowledging that its main purpose was to do justice administratively feasible in the context of "mass litigation" (500 other cases)), *cert. denied sub nom.*, *Rexall Drug Co. v. Tigue*, 493 U.S. 944 (1989).

¹⁰ RESTATEMENT (SECOND) OF TORTS § 876 (1977). This section provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

version of concert of action, discussed in section 876 (c) of the Restatement (Second) of Torts,¹¹ and successfully applied in *Bichler*,¹² has seemingly been ignored or even abandoned by New York courts.¹³

II. THE PROBLEM POSED BY THE THREE VARIETIES OF CONCERT OF ACTION

Concert of action, at least as rendered by the Restatement, has three varieties.¹⁴ The first variety is indistinguishable from traditional conspiracy, requiring all actors to knowingly join a tortious venture, while not requiring each member to actually engage in the injurious act.¹⁵ The second variety is similarly indistinguishable from classical aiding and abetting, requiring that all actors knowingly give substantial assistance to the wrongdoer, while again not requiring that each actor engage directly in the injurious act.¹⁶ The third variety requires that each actor engage in wrongful conduct that has the effect of substantially assisting the other(s), while, unlike the first two, not requiring any knowledge at all of the other's injurious act.¹⁷ Because this is almost identical to classical

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id.

Caveat: The Institute takes no position on whether the rules stated in this Section are applicable when the conduct of either the actor or the other is free from intent to do harm or negligence but involves strict liability for the resulting harm. *Id.*

¹¹ *Id.* at § 876(c).

¹² *Bichler v. Eli Lilly*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

¹³ *See Hymowitz v. Eli Lilly and Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).

¹⁴ RESTATEMENT (SECOND) OF TORTS § 876 (1977).

¹⁵ *Id.* at § 876(a).

¹⁶ *Id.* at § 876(b).

¹⁷ *Id.* at § 876(c).

aiding abetting without the requirement of knowledge, it seems accurate to characterize it as "unconscious aiding and abetting."¹⁸

The reasons for the judicial retreat from concert of action as a theory by which a party can be held liable for the injurious conduct of another are several, but certainly among the most important is judicial discomfort with theories which impose liability without any personal wrong or, in a sense, liability without fault. Thus, it is not surprising that, in an age when courts and commentators limit product liability because of their unease with the notion of liability without fault, they similarly distance themselves from doctrines that tend to impose liability for the wrongful acts of others.¹⁹ Except for classic conspiracy - and even there doubts seem to exist at some levels - courts seem nervous about doctrines which lack a direct connection between wrongful act and tortious harm.²⁰

As a result, at least two elements of concert of action have become troublesome, and yet the trouble seems more a product of confusion and ignorance than of logic. One area is that of "parallel action."²¹ Parallel action can be the basis of liability for concerted action to showing, circumstantially, that the parties knew of each other's acts and perhaps even engaged in an agreement, tacit or otherwise, to achieve a common goal.²² In that sense, parallel action is simply an

¹⁸ Throughout this article, the terms "unconscious aiding and abetting" and "subsection (c) liability" are used interchangeably because they seem identical and because "unconscious aiding and abetting" accurately dramatizes the utility and significance of that doctrine. See RESTATEMENT (SECOND) OF TORTS § 876(c) (1977).

¹⁹ See, e.g., *Shackil v. Lederle Laboratories, a Division of American Cyanamid Co.*, 116 N.J. 155 (1989). The court provided that as there are "inherent problems [with] applying concert-of-action theory to prescription drugs, we are persuaded that the theory is not applicable to this case." *Id.* at 164. Furthermore the court found that there were "no allegations that the manufacturers of DPT had a 'tacit understanding' or 'common plan' to produce a defective product or not to conduct adequate tests on the vaccine." *Id.* The court concluded by noting that in contrast to DES manufacturers, "each of the manufacturers involved in this case made the DPT vaccine by a different process, protected by patent or trade secret." *Id.*

²⁰ *Id.*

²¹ See, e.g., *Ryan v. Eli Lilly*, 514 F. Supp. 1004, 1016 (D.S.C. 1981).

²² The courts are reluctant to allow parallel action to prove an implied or tacit agreement. Were it not for the underlying doctrine making one defendant liable for another defendant's acts, it would be difficult to understand why a court would have a problem with parallel action. Parallel action, after all, is nothing

evidentiary doctrine allowing a court to conclude that an agreement is implied where there is no evidence,²³ or a failure of evidence, to prove express agreement.²⁴ The other area is also the third branch of concerted action: liability due to tortious conduct substantially assisting another's injurious acts without knowledge of that other's tortious conduct, which can be accurately characterized as unconscious or unknowing aiding and abetting.²⁵

It is surely not coincidental that both of these areas from which courts have retreated share one thing in common: an absence of proof of knowledge of the tortfeasor's wrongful conduct. In that sense, they share some element of strict liability that has characterized, at least until recently, modern product liability law.²⁶

more than a particular application of the use of circumstantial evidence to prove indirectly, that which cannot be proven through direct evidence. *See* *Sea-Land Service, Inc. v. Atlantic Pacific International, Inc.*, 61 F. Supp. 2d 1092, 1100-01 (D.Hawaii 1999); *McClure v. Owens Corning Fiberglass Corp.*, 298 Ill.App.3d 591, 598, 698 N.E.2d 1111, 1116 (1998); *But see* *Smith v. Eli Lilly & Co.*, 173 Ill.App.3d 1, 18, 527 N.E.2d 333, 344 (1988).

²³ *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 128 (3d Cir. 1999). The *Baby Food* the court commented that "[i]n the absence of direct evidence, as we previously stated, consciously parallel business behavior can be important circumstantial evidence from which to infer an agreement." *Id.* *See also* *Bogosian v. Gulf Oil Corp.*, 596 F. Supp. 62, 69 (E.D.Pa. 1984). In *Bogosian*, the court noted that the "[p]laintiffs, not surprisingly, do not have direct evidence of a conspiracy. Plaintiffs do, however, have certain circumstantial evidence. Plaintiffs offer the testimony of expert witnesses that the defendants engaged in consciously parallel action" *Id.*

²⁴ *See* *Bichler v. Eli Lilly*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). The Court of Appeals, in *Bichler*, understood parallel action to be some kind of substantive element of concert of action whose acceptance would impermissibly alter concert of action and illegitimately extend it. But it seems inescapably obvious that parallel action is nothing more than an evidentiary doctrine which defendants fear. The court is overly sensitive to this fear characterizing it, first, as substantive, and second, as unacceptable. *Id.* at 582.

²⁵ RESTATEMENT (SECOND) OF TORTS § 876(b) (1977). An actor is liable for harm resulting to a third person from the tortious conduct of another "if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . ." *Id.*

²⁶ *See generally* RESTATEMENT (SECOND) OF TORTS § 402A (1977). Under § 402A the plaintiff must prove that:

- (1) the seller was engaged in the business of selling the product that caused harm; (2) the product was sold in a defective condition unreasonably dangerous to the consumer or user; (3) the product

Although parallel action should really be viewed as a relatively unintrusive evidentiary rule, it seems likely that courts which see it as part of concerted action, generally, are confusing it with the third branch of concerted action.²⁷ Since both doctrines, however, are surely legitimate and historically valid common law mechanisms, the confusion is doubly unfortunate.

Why is unconscious aiding and abetting important as a legal doctrine? In multi-party product tort litigation, it may be very difficult to connect a particular defendant with a particular plaintiff.²⁸ Absent direct proof of agreement and cooperation between multiple defendants, or - almost as difficult - proof of knowledge of each other's tortious acts, there may be no remedy for exactly those kinds of torts which produce the widest damage (i.e., those involving many defendants and numerous plaintiffs who may be widely dispersed over geography and time). To the extent that a court does not allow proof of merely parallel action to suffice, subsection (c) offers an

was one which the seller expected to and did reach the consumer or user without any substantial change from the condition in which it was sold; and (4) the defect was a direct and proximate cause of the plaintiff's injuries.

Id.; see also *Warner Fruehauf Trailer Co. Inc. v. Boston*, 654 A.2d 1272, 1274 (1995).

²⁷ See RESTATEMENT (SECOND) OF TORTS § 876 (C) (1977). This section provides "one is subject to liability if he . . . gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." *Id.*

²⁸ See e.g., *In re Northern District of California Dalkon Shield IUD Product Liability Litigation*, 693 F.2d 847 (9th Cir. 1982) (addressing the difficulty of proving typicality in personal injury toxic tort cases, particularly in circumstances in which multiple plaintiffs sue multiple defendants). The Ninth Circuit states:

In proving liability under a negligence theory, however, the plaintiffs have to prove not only their injuries, but . . . each defendant owed them a duty of care and also what those different standards of care were, if they were breached, and--most important--if the breaches proximately caused the plaintiffs' varying injuries [T]o prove liability under a breach of warranty theory, representative plaintiffs must exist for each type of warranty, assurance, or medical advice each plaintiff received. The difficulty of meeting the typicality requirement seems obvious.

Id. at 854-55.

effective alternative, since a party can be liable for the torts of other defendants without proof that the party knew of the defendant's tortious conduct.²⁹ Combined with its rejection of parallel action, New York's apparent rejection of unconscious aiding and abetting therefore bars recovery in exactly those situations where it is often most needed,³⁰ such as cases involving multiple potential defendants and individual plaintiffs who are unable to prove the state of mind of those various defendants.³¹

III. CONCERT OF ACTION'S FIFTEEN MINUTES OF FAME

The fifteen minutes of fame for concert of action came with the DES³² litigation. Plaintiffs, daughters of mothers who ingested DES while pregnant with them, sued the DES manufacturers for injuries suffered as a direct result of their mothers' ingestion of the DES pill.³³ There was no way the actual manufacturer of the ingested pill

²⁹ RESTATEMENT TORTS (SECOND) § 876(C) (1977).

³⁰ See *Bichler v. Eli Lilly*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

³¹ *Id.*

³² See *id.* at 576-77, 436 N.E.2d at 184, 450 N.Y.S.2d at 778. Diethylstilbestrol (DES) is a powerful synthetic substance, which duplicates the activity of estrogen, a female sex hormone naturally present in all women and, in lesser amounts, present also in men. DES was invented by British researchers in 1937, but never was patented. As a result, a number of pharmaceutical manufacturers produced and marketed DES after securing Food and Drug Administration (FDA) approval. The FDA approved the marketing of DES in the United States for the treatment of vaginitis, enlargement of the breast, excessive menstrual bleeding, symptoms of menopause, prostrate cancer, and human miscarriage. The FDA later banned the use of DES for the treatment of pregnancy-related problems, but not until after the drug had been taken by as many as several million pregnant women. It was subsequently learned that there was a link between prenatal exposure to DES and the later development of a previously rare form of cervical or vaginal cancer in daughters born to women who had ingested the drug while pregnant. *Id.*

³³ See, e.g., *Hymowitz v. Eli Lilly and Company*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989); *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); *Enright v. Eli Lilly and Company*, 77 N.Y.2d 377, 570 N.E.2d 198, 568 N.Y.S.2d 550 (1991).

could be identified.³⁴ What plaintiffs were able to show, however, was that all the DES manufacturers, when applying for FDA approval, followed the same pattern as the original twelve DES manufacturers and marketed the product without first testing it on pregnant mice.³⁵

All the later manufacturers relied on the same scientific data as had the original manufacturers when they produced and marketed the pill.³⁶ Liability could have been premised upon agreement between the various defendants, classical conspiracy, or, alternatively, upon mutual knowledge and support of the others' torts, classical aiding and abetting, or upon the fact that each defendant committed the independent tort of wrongful testing which had the effect of substantially aiding the others in their tortious acts.³⁷ Such independent action is unconscious aiding and abetting and does not require proof of knowledge of the other defendants' tortious conduct.³⁸

Only one reported New York decision, *Bichler v. Eli Lilly*, has applied concert of action in the Restatement sense, and accordingly held the manufacturers liable.³⁹ After *Bichler*, several other courts reluctantly followed it,⁴⁰ observing, with some accuracy, that New York law was unclear with regard to the application of concert of

³⁴ *Bichler*, 55 N.Y.2d at 579, 436 N.E.2d at 185, 450 N.Y.S.2d at 779. The inability of plaintiffs to identify the specific manufacturer of the DES was due to the fact that all DES prescribed for pregnant mothers consisted of the identical chemical composition and was typically manufactured and prescribed generally. *Id.*

³⁵ *See id.* at 55 N.Y.2d at 578, 436 N.E.2d at 185, 450 N.Y.S.2d at 779 (1982).

³⁶ *Id.*

³⁷ *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 326, 436 N.Y.S.2d 625, 631 (1st Dep't 1981).

The [trial] court further stated that concerted action could also be defined as 'acting independently of each other in committing the same wrongful act, but although acting independently, their acts have the effect of substantially encouraging or assisting the wrongful conduct of the other, which, in this case, was the alleged failure to adequately test.

Id.

³⁸ *Id.*

³⁹ *Bichler*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776.

⁴⁰ *See Gauling v. Celotex Corp.*, 772 S.W.2d 66 (Tex. Sup. Ct. 1989) (noting that most jurisdictions that have considered [concert of action] have rejected its application to latent disease product liability cases).

action to product liability cases in general and DES cases in particular.⁴¹ The observation is somewhat accurate because, though *Bichler* undoubtedly applied concert of action, arguably in all its forms, the Court of Appeals avoided addressing the issue decisively by noting that the defendant had not adequately preserved it for appeal.⁴² Nevertheless, the Court of Appeals did note that the evidence was sufficient to satisfy concert of action in all its forms.⁴³ In *Kaufman v. Eli Lilly & Co.*,⁴⁴ the court denied plaintiff the benefit of *Bichler* for reasons of what it called "fairness." According to the court, other defendants would still be free to claim, against the same plaintiff, "that concerted action [was] not an appropriate theory of liability" and following the *Bichler* approach as to only one defendant would be inconsistent and unfair."⁴⁵ Whether this is generically true of concert of action as a rule is unclear, though it seems likely. But the court's argument appears unpersuasive since it is little different than arguments against, for instance, joint and several liability which may impose greater liability on one defendant than others; such "unfairness" is seldom relevant when, as here, the rule under consideration is expressly designed to benefit innocent plaintiffs at the expense of wrongful defendants.⁴⁶

⁴¹ *Id.*; see also *Hymowitz v. Eli Lilly and Company*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989). In *Hymowitz*, the use of concert of action theory in DES cases was ultimately rejected. The Court of Appeals, speaking through Chief Judge Wachtler, stated:

Now given the opportunity to assess the merits of this theory, we decline to adopt it as the law of this State. Parallel behavior, the major justification for visiting liability caused by the product of one manufacturer upon the head of another under this analysis, is a common occurrence in industry generally. We believe, therefore, that inferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit.

Id. at 508, 436 N.E.2d at 182, 450 N.Y.S.2d at 776.

⁴² *Bichler*, 55 N.Y.2d at 587, 436 N.E.2d at 190, 450 N.Y.S.2d at 784.

⁴³ *Id.* at 584-85. 436 N.E.2d at 188, 450 N.Y.S.2d at 782. There is, of course, the question of the "notorious" footnote seven, which seems to undercut the language in the text approving concert of action. See *infra* note 79.

⁴⁴ 65 N.Y.2d 449, 482 N.E.2d 63, 492 N.Y.S.2d 584 (1985).

⁴⁵ *Id.* at 457, 482 N.E.2d at 68, 492 N.Y.S.2d at 589.

⁴⁶ Compare *Kaufman*, 65 N.Y.2d at 453 (noting that the concerted action liability found in *Bichler* was based on an unresolved question of law, and as such, it "should not be given preclusive effect in this litigation") with *Centrone*

A. *Section 876 of the Restatement (Second) of Torts*

It is certainly, perhaps even tautologically, true that a tortfeasor acts in concert with another when that tortfeasor acts jointly with the other in furtherance of a purposively common design.⁴⁷ This is classic conspiracy law. Yet, under the section 876 of the Restatement, a defendant also acts in concert with another when that defendant simply (b) "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement of the other so to conduct himself" (this is classic aiding and abetting law); or even more simply, (c) "gives substantial assistance to others in accomplishing a tortious result if his own conduct, separately considered, constitutes a breach of duty to the third person."⁴⁸ All three types of concerted action were considered with arguably implicit approval in *Bichler*,⁴⁹ and later seemingly abandoned in New York in *Hymowitz*.⁵⁰

One thing the Restatement does not help with, however, is the applicability of concert of action to strict product liability. In a clearly worded caveat,⁵¹ the Restatement expressly avoids taking a position on this issue.⁵²

Clearly, the Restatement subsection (c), unconscious aiding and abetting liability, demands only a breach of duty, not necessarily tortious conduct. It requires that one's wrongful action have an

v. C. Schmidt & Sons, Inc., 114 Misc.2d 840, 843-44, 452 N.Y.S.2d 299, 302 (Sup. Ct. Nassau Co., 1982) (reading *Bichler* as the law regarding concert of action and stating that it is New York law upholding the trial court verdict because there was "sufficient evidence to support recovery by the plaintiff pursuant to either a theory of 'concerted action by agreement' or 'concerted action by substantial assistance'").

⁴⁷ *Id.*

⁴⁸ Concert of action "could be defined as wrongdoers acting independently of each other in committing the same wrongful act, but although acting independently, their acts had the effect of substantially encouraging or assisting the wrongful conduct of the other." 22 A.L.R.4th 183, 184 (1997) (footnote omitted).

⁴⁹ *Bichler v. Eli Lilly*, 55 N.Y.2d 571, 578, 436 N.E.2d 182, 184, 450 N.Y.S.2d 776, 778 (1982).

⁵⁰ See *supra* note 33.

⁵¹ RESTATEMENT (SECOND) OF TORTS § 876 (1977).

⁵² *Id.*

encouraging effect on the other's torts,⁵³ without any requirement of knowledge of the other's torts. However, as case law shows, unconscious aiding and abetting has received little judicial attention or support.⁵⁴ Undoubtedly, unconscious aiding and abetting is the most threatening to the manufacturing community, but because of its rejection of a knowledge requirement, it is the most attractive to victims of multi-party torts. Whether purposely or by accident, by design or through confusion, New York courts after *Bichler* have limited the use of concert of action almost exclusively to traditional conspiracy and occasionally to aiding and abetting.⁵⁵

B. *The Bichler Case*

Before *Bichler*, there was *Hall v. E.I. DuPont de Nemours & Co., Inc.*⁵⁶ As in *Bichler*, the defendants in *Hall* were also manufacturers of unsafe products.⁵⁷ In *Hall*, the manufacturers produced blasting

⁵³ *Id.*

⁵⁴ *In re New York County DES Litigation*, 168 A.D.2d 50, 53, 570 N.Y.S.2d 802, 804 (1st Dep't 1991) (affirming case management order which rejected concert of action based on *Hymowitz* and stare decisis); *Morton v. Abbott Labs.*, 538 F.Supp. 593 (M.D.Fla.1982) (finding concert of action in non-identification cases not sustainable under Florida law); *Payton v. Abbott Labs.*, 512 F. Supp. 1031 (D.Mass.1981) (applying same reasoning under Massachusetts law); *Ryan v. Eli Lilly and Co.*, 514 F. Supp. 1004 (D.S.C.1981) (finding same under North and South Carolina law); *Sindell v. Abbott Labs.*, 26 Cal.3d 588 (1980) (same under California law); *Smith v. Eli Lilly and Co.*, 173 Ill.App.3d 1 (Ill.App.1988) (same under Illinois law); *Zafft v. Eli Lilly and Co.*, 676 S.W.2d 241(Sup.Ct.Mo. 1984) (*en banc*) (same under Missouri law); *Burnside v. Abbott Labs.*, 351 Pa.Super. 264 (Pa.Super. 1985) (same under Pennsylvania law); *Martin v. Abbott Labs.*, 102 Wash.2d 581 (Sup.Ct.1984) (*en banc*) (same under Washington law); *Collins v. Eli Lilly and Co.*, 116 Wis.2d 166, (Sup.Ct. 1984) (same under Wisconsin law).

⁵⁵ *See, e.g., Rubel v. Eli Lilly and Co.*, 1991 WL 29895 (S.D.N.Y.1991) (finding concert of action theory cannot be applied where there is no proof that two defendants were the only ones who could have produced the drug plaintiff took).

⁵⁶ 345 F. Supp. 353 (E.D.N.Y. 1972) (holding that defendants engaged in joint hazardous conduct and thus could be liable for the joint control of accidental explosion because their product was manufactured to meet industry-wide safety standards set by their trade association).

⁵⁷ *Id.* at 357.

caps without the necessary warnings about the product's danger;⁵⁸ and as also evident in *Bichler*, one of the theories of liability was concert of action.⁵⁹

Analyzing the concert of action theory in *Hall*, Judge Weinstein stated that it potentially embraces widely varying facts.⁶⁰ The existence of an explicit agreement and joint action among the tortfeasors is the classic "concert of action," but concert of action can also be established by defendants' "parallel behavior sufficient to support an inference of tacit agreement or cooperation."⁶¹ The court did not address either conscious or unconscious aiding abetting [subsection (b) or subsection (c)] liability.

In *Bichler v. Eli Lilly*,⁶² the New York Court of Appeals arguably affirmed the trial court's treatment of section 876 of the Restatement (Second) of Torts, and Prosser's interpretation of it.⁶³ In *Bichler*, plaintiff brought an action against the major manufacturers of DES for damages caused to her by her mother's ingestion of the drug while pregnant.⁶⁴ The plaintiff was unable to identify the specific manufacturer of the pills her mother ingested, and the pharmacist who apparently filled the prescription was unable to produce any records showing that they were the defendant's.⁶⁵ Since the plaintiff was unable to prove traditional tort causation she was allowed to amend her complaint on the theory of concerted action claiming that defendant and other manufacturers of DES wrongfully tested and marketed the drug, and, being all liable in concert, it did not matter that plaintiff could not identify the specific defendant who caused the damage.⁶⁶ The court held that "[all] those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with

⁵⁸ *Id.*

⁵⁹ *Id.* at 360.

⁶⁰ *Id.* at 363.

⁶¹ *Id.* at 374. The court found that "such cooperation has the same effects as overt joint action, and is subject to joint liability for the same reasons." *Id.*

⁶² 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1981).

⁶³ *Bichler*, 55 N.Y.2d at 580-81, 436 N.E.2d at 186, 450 N.Y.S.2d at 780.

⁶⁴ *Id.* at 578, 436 N.E. 2d at 185, 450 N.Y.S.2d at 779.

⁶⁵ *Id.*

⁶⁶ *Id.*

him.”⁶⁷ While the trial court expressly adopted subsection (c) in its jury instructions, Prosser’s language does not necessarily embrace such liability, though the language is not inconsistent with it, either.⁶⁸

The trial court addressed concerted action in two steps: it first approached simple conspiracy, noting the requirement for agreement, but allowing for parallel action to prove an implied agreement in the possible absence of an express agreement.⁶⁹ It then addressed both conscious and unconscious aiding and abetting under the rubric of “substantial assistance,” even though traditional aiding and abetting requires conscious knowledge of the tortious conduct being aided or abetted and subsection (c) does not.⁷⁰ The court demanded satisfaction of subsection (c)’s wrongful conduct requirement, but dispensed with any requirement of knowledge of the ultimate tort, consistent with unconscious aiding and abetting liability.⁷¹

The trial court discussed the possible express agreement between the defendants.⁷² That agreement was arguably shown by: the original cooperation between the twelve manufacturers and pooling of information, the agreement on the same basic chemical formula, and, the adoption of Lilly’s literature as a model for package inserts for joint submission to the FDA in 1941.⁷³

The trial court also discussed a possible implied agreement.⁷⁴ The court observed that the twelve original manufacturers established a pattern for the acceptance of DES by the FDA, and thus acted on behalf of all later manufacturers.⁷⁵ The later manufacturers, by following the pattern of the twelve original manufacturers, consciously paralleled the original activity (they relied on Lilly’s research studies and requested in their application the same standard dosage) and thus tacitly acceded to the original agreement for their own benefit.⁷⁶

⁶⁷ *Bichler*, 79 A.D.2d at 325, 436 N.Y.S.2d at 630 (citing PROSSER, TORTS (4th ed.) § 46, p. 292).

⁶⁸ *Id.*

⁶⁹ *See id.* at 327, 436 N.Y.S.2d at 631.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 330, 436 N.Y.S.2d at 633.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 330-31, 436 N.Y.S.2d at 633.

From the conscious parallel conduct among all the DES manufacturers in marketing the drug without first testing its effect on pregnant mice, the court found there could be an implied agreement or understanding between the actors.⁷⁷ In other words, concert of action by defendants could be proved because although acting independently, "their acts [had] the effect of substantially encouraging or assisting the wrongful conduct of the other, which, in this case, was the alleged failure to adequately test [the drug]."⁷⁸

In *Bichler*, the Court of Appeals did not reverse the trial court's recognition of concert of action under all three paragraphs of Section 876.⁷⁹ However, due to its procedural posture, *Bichler* never achieved the status as precedent on the issue and, indeed, with respect to the use of parallel action as evidence of a tacit agreement, its holding has been described as a "modification of the concert of action theory"⁸⁰ or as "a modified form"⁸¹ of concert of action which was not followed thereafter and, in *Hymowitz v. Eli Lilly & Co.*,⁸² was all but destroyed as a useful legal theory. It is undeniable that the trial court adopted the Restatement view entirely, and the Court of Appeals, by noting the failure to preserve the issue, took no substantive position.⁸³ Nevertheless, to the extent that it might have become a precedent for concert of action through subsection (c) substantial assistance, *Bichler* did not fulfill expectations.

⁷⁷ *Id.* at 326, 436 N.Y.S.2d at 631.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ David A. Fisher, *Tort Law: Expanding the Scope of Recovery without Loss of Jury Control*, 11 HOFSTRA L. REV. 937, 984 (1983).

⁸¹ Paul D. Rheingold, *The Hymowitz Decision--Practical Aspects of New York DES Litigation*, 55 BROOK. L. REV. 883, 885 (1989). The author refers to footnote 7 in *Bichler* as "notorious," since the court, despite effectively declaring the issue non-justiciable because it was not preserved for appeal, nevertheless seemed to state, in that footnote, that concert of action cannot be premised on parallel action alone. *Id.* at 885.

⁸² 73 N.Y.2d 487, 508, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989), *aff'g sub nom.*, *Tigue v. E.R. Squibb & Sons, Inc.*, 136 Misc. 2d 467, 518 N.Y.S.2d 891 (NY Sup. Ct. 1987). *See also supra* note 33.

⁸³ *See supra* note 79.

C. Concert of Action Post-Bichler: Nothing More than Conspiracy and Intentional Aiding and Abetting

In *Hymowitz*,⁸⁴ the New York Court of Appeals declined to adopt a "modified version of concerted action," holding that inferring an agreement from parallel activity alone would improperly expand the concept of concerted action "beyond a rational or fair limit."⁸⁵

The trial court analyzed both theories of liability submitted to the jury in *Bichler*.⁸⁶ After examining the theories of concerted action by implied agreement under Section 876 (a) and concerted action by substantial assistance under Section 876 (b) and (c), the court denied defendants' motion to dismiss.⁸⁷ However, on appeal, the court refused to apply concert of action because the record did not show anything "beyond [parallel] conduct to show [an] agreement, tacit or otherwise, to market DES for pregnancy use without taking proper steps to ensure the drug's safety."⁸⁸ The court further noted that "[p]arallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim."⁸⁹ The court, unfortunately, did not identify exactly what additional action was required beyond parallel action. Furthermore, the court completely disregarded unconscious aiding and abetting liability. It was satisfied with finding for plaintiff under the theory of market share liability.⁹⁰

⁸⁴ *Hymowitz*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989).

⁸⁵ *Id.* at 508, 539 N.E.2d at 1076, 541 N.Y.S.2d at 548.

⁸⁶ *Tigue*, 136 Misc. 2d at 470-71, 518 N.Y.S.2d at 894.

⁸⁷ *Id.* at 475, 518 N.Y.S.2d at 897.

⁸⁸ *Hymowitz*, 73 N.Y.2d at 506, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946.

⁸⁹ *Id.* at 506, 539 N.E.2d at 1074-75, 541 N.Y.S.2d 946-47 (citations omitted).

⁹⁰ Paul D. Rheingold, *The Hymowitz Decision--Practical Aspects of New York DES Litigation*, 55 BROOK. L. REV. 883, 886 (1989). The author notes that:

The defendants' detest for concert of action arose from the obvious consequence that each would be held potentially liable for 100% of the damages of each DES injured person, and that once concert of action was applied liability was inherently established. By contrast, under the market share doctrine, the defendants saw not only that liability would have to be established separately, but also that, if joint liability were rejected, they would be liable only for their share of the market, however that might be worked out.

Id.

In *Rastelli v. Goodyear Tire & Rubber Co.*,⁹¹ the court rejected liability premised on concerted action via conspiracy.⁹² The plaintiff claimed that liability existed on the basis of concerted action by certain defendants, including Goodyear, Firestone, Budd and Kelsey-Hayes.⁹³ Defendants were "manufacturers of substantially all multi-piece tire rims in the United States, with respect to the design, manufacture and marketing 'of a dangerous and defective product and the failure to warn of same.'"⁹⁴

The Appellate Division, Third Department, denied defendants' motions to dismiss in *Rastelli*.⁹⁵ That court held that the plaintiff had a right to attempt to establish that the manufacturers of the offending rims engaged in tortious activity by breaching a post-sale duty to warn.⁹⁶ The court also held that the plaintiff had a right to establish that the breach was the result of a collective understanding to "prevent public awareness of the extreme propensity of all such rims to explode; and to block governmental action which would have required the manufacturers to recall those products."⁹⁷ The Court of Appeals, however, reversed and dismissed the concert of action claim, largely by rejecting the use of parallel action to show an implied agreement.⁹⁸ It emphasized that each defendant charged with "acting in concert" must have acted tortiously and that one of the defendants must have acted in pursuance of the agreement.⁹⁹ Then it relied on *Hymowitz*, which:

declined to adopt a modified version of concerted action . . . inferring agreement from the common occurrence of parallel activity . . . [B]ecause application of concerted action renders each manufacturer jointly liable for all damages stemming from any defective product of an entire industry, parallel activity by

⁹¹ 79 N.Y.2d 289, 591 N.E.2d 222, 582 N.Y.S.2d 373 (1992).

⁹² *Id.* at 297-98, 591 N.E.2d at 225, 582 N.Y.S.2d at 376-377.

⁹³ *Id.* at 296, 591 N.E.2d at 224, 582 N.Y.S.2d at 378.

⁹⁴ *Rastelli v. Goodyear Tire & Rubber Co.*, 165 A.D.2d 111, 113, 565 N.Y.S.2d 889, 890 (3d Dep't 1991).

⁹⁵ *Id.* at 116, 565 N.Y.S.2d at 892.

⁹⁶ *Id.* at 115, 565 N.Y.S.2d at 891.

⁹⁷ *Id.*

⁹⁸ *Rastelli*, 79 N.Y.2d 289, 295, 591 N.E.2d 222, 224, 582 N.Y.S.2d 373, 375.

⁹⁹ *Id.*

manufacturers is not sufficient justification for making one manufacturer responsible for the liability caused by the product of another manufacturer.¹⁰⁰

The *Rastelli* court concluded that it saw “no reason . . . for extending the concerted action concept to create industry-wide liability and make recovery possible when . . . plaintiff alleges only parallel activity.”¹⁰¹

Post *Rastelli*, New York courts have viewed concert of action as virtually, if not in fact, synonymous with conspiracy.¹⁰² For example, the court in *Appavoo v. Phillip Morris Inc.*,¹⁰³ held that “[t]he elements of a concerted action claim are: 1) an agreement express or tacit to participate in a common plan or design to commit a tortious act, and 2) that each defendant acted tortiously, and 3) that one of the defendants committed a tort pursuant to the agreement.”¹⁰⁴ Similarly, in *Cresser v. American Tobacco Company*,¹⁰⁵ the New York State Supreme Court in Kings County, possibly confusing subsections (a) and (c) liability, compared the elements of concerted action with the elements of civil conspiracy.¹⁰⁶ The court held that they differ only in “the fact that concerted action require[d] each of the parties to the unlawful agreement to have committed a tortious act while the conspiracy require[d] only one of the participants of the agreement to have committed an overt act in furtherance of the agreement.”¹⁰⁷ In *King v. Eastman Kodak Co.*,¹⁰⁸ the court incorporated Prosser’s definition of concert of action,¹⁰⁹ but denied

¹⁰⁰ *Id.* at 295-96, 591 N.E.2d at 224, 582 N.Y.S.2d at 375 (citations omitted).

⁹⁸ *Id.* at 296, 591 N.E.2d at 225, 582 N.Y.S.2d at 376.

¹⁰² See, e.g., *In re New York Silicone Breast Implant Litig.*, 166 Misc. 2d 85, 91, 631 N.Y.S.2d 491 (Sup. Ct. N.Y. County, 1995) (denying concert of action, and holding “that inferring agreement from common occurrence of parallel activity alone would improperly expand the concept of concerted action beyond a rational or fair limit”).

¹⁰³ 1998 WL 440036, at *1 (Sup. Ct. N.Y. County Jul. 24, 1998).

¹⁰⁴ 1998 WL 440036, at *6 (Sup. Ct. N.Y. County Jul. 24, 1998) (internal quotes omitted).

¹⁰⁵ 174 Misc.2d 1, 662 N.Y.S.2d 374 (Sup. Ct. Kings County 1997).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 7, 662 N.Y.S.2d at 378-79 (footnote omitted).

¹⁰⁸ 219 A.D.2d 550, 631 N.Y.S.2d 832 (1st Dep’t 1995).

¹⁰⁹ *Id.* at 552, 631 N.Y.S.2d 833; PROSSER AND KEETON, ON THE LAW OF TORTS § 46 (5th ed. 1984) (defining the principal of concerted action as one that

defendants' liability for concert of action by substantial assistance.¹¹⁰ Federal cases post *Rastelli* understand *Rastelli* to be a conspiracy theory case, being premised on a showing of the traditional "common design" approach, having nothing to do, of course, with *Bichler's* "substantial assistance" theory.¹¹¹

New York courts treat conspiracy¹¹² the same as its sister-state courts do,¹¹³ and in the same manner as the Restatement (Second) of Torts, except for the outright rejection of parallel action as a merely evidentiary method of proving agreement.¹¹⁴ Notably, New York courts treat aiding and abetting similarly, in a completely unremarkable common law manner.¹¹⁵

holds liable all those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit).

¹¹⁰ *King*, 219 A.D.2d at 552, 631 N.Y.S.2d at 833.

¹¹¹ See *Pittman v. Grayson*, 149 F.3d 111, 122 (2d Cir. 1998); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1464 (2d Cir. 1995).

¹¹² See e.g., *Rose v. American Tobacco Co.*, 1997 N.Y. Misc. LEXIS 662 (Sup. Ct. N.Y. County, Oct. 15, 1997). The *Rose* court stated that "in order to use the concerted action theory, there must have been a tortious act committed by each of the conspirators within the scope of an agreement." *Id.* at *9-*10.; see also *Lindsay v. Lockwood*, 163 Misc. 2d 228, 625 N.Y.S.2d 393 (Sup. Ct. Monroe County 1994). The *Lindsay* court defined the tort concept of conspiracy as requiring "(1) an agreement (2) to participate in an unlawful act, (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme." *Id.* at 234, 625 N.Y.S.2d at 398 (internal quotes omitted) (citing RESTATEMENT (SECOND) OF TORTS § 876, comment a, illustration 2).

¹¹³ See *supra*, note 23.

¹¹⁴ See, e.g., *DaSilva v. American Tobacco Co.*, 175 Misc. 2d 424, 667 N.Y.S.2d 653 (Sup. Ct. New York Co., 1997). The *DaSilva* court held that allegations amounting to mere parallel activity among manufacturers was insufficient, and liability requires evidence of an actual agreement to commit an intentional tortious act. *Id.* at 431, 667 N.Y.S.2d at 657.

¹¹⁵ See, e.g., *Lindsay v. Lockwood*, 163 Misc. 2d 228, 625 N.Y.S.2d 393 (Sup. Ct. Monroe County 1994). The *Lindsey* Court noted that "[t]he elements of aiding and abetting are (1) a wrongful act producing an injury, (2) the defendant's awareness of a role as part of an overall illegal or tortious activity at the time he provides the assistance; and (3) the defendant's knowing and substantial assistance in the principal violation." *Id.* at 233, 625 N.Y.S.2d at 397 (internal quotes omitted) (citing RESTATEMENT (SECOND) OF TORTS § 876, comment d, illustrations 4 & 5); *Pittman v. Grayson*, 149 F.3d 111 (2d Cir. 1998). "In order to be liable for acting in concert with the primary tortfeasor

IV. CONCLUSION

While *Bichler* provided an inviting opportunity to use unconscious aiding and abetting as a means to assist consumers injured by products sold through an essentially anonymous marketplace, that opportunity was never realized. What remains of concert of action for product liability plaintiffs is painfully wanting. New York courts perceive concert of action to consist only of conspiracy and aiding and abetting. In *Lindsay v. Lockwood* for example, the court characterized concert of action as either conspiracy or, somewhat inaccurately, "aiding and abetting" from criminal law, ignoring section 876 (c).¹¹⁶

Similarly, in *Pittman v. Grayson*,¹¹⁷ the Second Circuit, relying on *Rastelli*, and *Lindsay*, recently discussed the elements of concerted-action liability, and noted that it included, *inter alia*, an express or tacit agreement "to participate in 'a common plan or design to commit a tortious act.'"¹¹⁸ Then it distinguished between Section 876(a) and (b), accurately, stating that paragraph (a) describes "conspiracy" and paragraph (b) "aiding and abetting."¹¹⁹ However, *Pittman* made no reference to subsection (c). In many ways it seems that, after *Bichler*, unconscious aiding and abetting simply does not exist.

Similarly, in *Sackman v. Liggett Group, Inc.*,¹²⁰ the court's discussion of concert of action was limited to theories advanced by

under either theory [conspiracy, pursuant to *Rastelli* or aiding and abetting], the defendant must know the wrongful nature of the primary actor's conduct." *Id.* at 123.

¹¹⁶ *Lindsay*, 163 Misc. 2d at 234, 625 N.Y.S.2d at 398.

¹¹⁷ 149 F.3d at 122 (2d Cir. 1998). In *Pittman*, Iceland Airlines (hereinafter "Icelandair") was accused of conspiracy in helping defendant remove plaintiff from the joint custody arrangements, and fly them to Iceland. *Id.* The court affirmed the trial court's judgment setting aside a verdict against Icelandair as a coconspirator or an aider and abettor on the ground that it did not have sufficient notice about defendant's tortious conduct. *Id.*

¹¹⁸ *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 295, 591 N.E.2d 222, 224, 582 N.Y.S.2d 373, 375 (1992) (quoting *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 506, 539 N.E.2d 1069, 541 N.Y.S.2d 941 (1989)).

¹¹⁹ *Pittman*, 149 F.3d at 123.

¹²⁰ 965 F. Supp. 391 (E.D.N.Y. 1997).

subsections (a) and (b).¹²¹ The court's emphasis on defendant's fraudulent conduct, involving a scheme with other tobacco manufacturers concealing information in their possession regarding the health risks associated with smoking, seems typical of present courts in treating concert of action in its conspiracy sense alone.¹²²

Sadly, concert of action in New York is limited to only conspiracy and conscious aiding and abetting. Unconscious aiding and abetting had its day, in *Bichler*, and that day is over.

¹²¹ *Id.*

¹²² *Id.* at 397.